85-1788

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE

Supreme Court Of The United States

October Term, 1985

JIM B. McCLENDON and NANCY P. McCLENDON,
Petitioners,

v.

SHELBY COUNTY, ALABAMA, A Political Subdivision of the State of Alabama; The COUNTY COMMISSION OF SHELBY COUNTY, ALABAMA; the PLANNING COMMISSION OF SHELBY COUNTY, ALABAMA, A Body Corporate and Political Subdivision of the State of Alabama; and SCOTCH BUILDING AND DEVELOPMENT COMPANY, a Corporation Organized and Existing Under the Laws of the State of Alabama,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

Whether the enabling legislation creating a local planning and zoning commission violates the equal protection clause of the Fourteenth Amendment where it requires that a person be a "freeholder" in order to qualify for appointment to the commission.

LIST OF PARTIES

The following were parties to this proceeding in The Supreme Court of Alabama: Jim B. McClendon; Nancy P. McClendon; Shelby County, Alabama, a Political Subdivision of the State of Alabama; the County Commission of Shelby County, Alabama; the Planning Commission of Shelby County, Alabama, a Body Corporate and Political Subdivision of the State of Alabama; and Scotch Building and Development Company, a corporation organized and existing under the laws of the State of Alabama.

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No.

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JIM B. McCLENDON and NANCY P. McCLENDON,
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SHELBY COUNTY, ALABAMA, A Political Subdivision of the State of Alabama; The COUNTY COMMISSION OF SHELBY COUNTY, ALABAMA; the PLANNING COMMISSION OF SHELBY COUNTY, ALABAMA, A Body Corporate and Political Subdivision of the State of Alabama; and SCOTCH BUILDING AND DEVELOPMENT COMPANY, a Corporation Organized and Existing Under the Laws of the State of Alabama,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Jim B. McClendon and Nancy P. McClendon (Petitioners) respectfully petition this Court for a Writ of Certiorari to review the Judgment and Decision of the Supreme Court of Alabama rendered on January 31, 1986, denying Petitioners' petition for Writ of Certiorari to the Court of Civil Appeals of Alabama.

OPINIONS BELOW

The decision of the circuit court of Shelby County, Alabama, is reprinted in the Appendix hereto as Appendix B. Petitioners

timely appealed this decision, and, on September 11, 1985, the Court of Civil Appeals of Alabama issued its opinion, which is reprinted in the Appendix as Appendix C. Rehearing was timely requested by Petitioners, and after denial of such, Petitioners applied to the Supreme Court of Alabama for a Writ of Certiorari. This application was denied on January 31, 1986, and a copy of the denial is reprinted as Appendix A.

JURISDICTION

This Court has jurisdiction to review the decision of the Court below under 28 U.S.C. § 1257 in that Petitioners allege that the state legislative enactment is repugnant to the Federal Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES

The pertinent portions of the state enabling legislation creating the Shelby County Planning Commission (1982 Ala. Acts No. 693 as amended by 1984 Ala. Acts No. 454) and the Fourteenth Amendment to the United States Constitution are reprinted at Appendix D.

STATEMENT OF THE CASE

A. Legislative History

The Shelby County Planning Commission was originally organized in 1965 prior to, and perhaps in anticipation of, the urban development of Shelby County, Alabama. 1965 Ala. Acts No. 816. The enabling legislation under which the Shelby County Planning Commission was originally formed was held to be invalid under state law in the case of *Adam v. Shelby County Commission,* 415 So. 2d 1066 (Ala. 1982). In direct response to the decision in *Adam v. Shelby County Commission,* id., the legislature of the State of Alabama enacted the present enabling legislation. 1982 Ala. Acts No. 693. After the present action was filed, legislation was introduced to amend the 1982 legislation. 1984 Ala. Acts No. 454.

The freeholder qualification appeared in the 1965 legislation and has been carried forward in all of the subsequent legislation relating to the Shelby County Planning Commission.

B. Procedural Overview

Petitioners brought this action in the Circuit Court of Shelby County, Alabama, alleging, in their complaint as amended, inter alia, violations of 42 U.S.C. § 1983 and that the enabling legislation creating the Shelby County Planning Commission was constitutionally infirm in that it violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and pertinent provisions of the Constitution of Alabama of 1901.

The state trial court denied all relief requested by Petitioners by judgment entered on September 6, 1984.

On appeal, the Court of Civil Appeals of Alabama affirmed the judgment of the trial court holding that it was rational for the legislature to conclude that "freeholders" are the persons best qualified to make land planning decisions. The Supreme Court of Alabama denied Petitioners' Application for a Writ of Certiorari to the Court of Civil Appeals of Alabama, but refused to approve the reasoning applied by the Court of Civil Appeals to Petitioners' constitutional arguments.

C. State Court Appellate Decisions

The Court of Civil Appeals of Alabama held, as a factual matter, that the configuration in question on the plat attacked in Petitioners' complaint was not a cul-de-sac. The court continued its opinion and addressed the Petitioners' equal protection attack on the enabling legislation. The Court of Civil Appeals explicitly determined that a rational relationship test should be applied to the "freeholder" qualification and that a rational basis did, in fact, exist for the qualification.

The Alabama Supreme Court denied Petitioners' request for Writ of Certiorari, but stated that it should not be understood

as approving the language, reasoning, or conclusions of law of the Court of Civil Appeals.

REASONS FOR GRANTING THE WRIT

The court below held valid a legislative act applicable only to Shelby County, Alabama, against Petitioners' claim that the act is invalid in that the act operatively denies equal protection of the law where it requires a person to be a "freeholder" in order to be eligible for appointment to the Shelby County Planning Commission.

A freeholder qualification has been recognized as racially discriminatory under state court decisions and the decisions of this Court.

Under the decisions of the Alabama supreme court, a person who rents real property is not a freeholder; one must be the owner of a freehold estate in real property. *Iverson v. State,* 52 Ala. 170 (1875). In *Iverson,* id., it was held that a trial court erred in failing to disqualify a juror who had rented land where the juror qualification statute required a potential juror to be a freeholder.

This juror qualification statute has recently been addressed by the Alabama Supreme Court in *Wilder v. DiPiazza,* 481 So. 2d 1091 (Ala. 1985), where it was said:

> In other words, the "resident householder or freeholder" ground for challenge is viable notwithstanding the juror's qualification as a "resident of the county for more than 12 months." Thus, if a prospective juror is qualified under the 12-month requisite of § 12-16-60(a)(1), he or she may yet be subject to challenge for cause for not having been a resident "householder" or "freeholder" (whatever these pre-Civil War terms mean or were ever perceived to mean) for the last preceding six months, pursuant to § 12-16-150(1).
>
> . . . The "not a relevant avenue of inquiry" reason given by the trial court cannot withstand appellate review unless we hold forthrightly that the trial court had the right to

> totally ignore the "householder or freeholder" qualification. Indeed, this, in legal effect, is exactly what the trial court necessarily did in disallowing the question. It seems altogether too obvious on its face to warrant discussion that § 12-16-150(1) cannot meet constitutional muster. For this reason, I would affirm and make it abundantly clear that this antiquated ground for challenge of a juror must be struck down as repugnant to our federal and state constitutions.

481 So. 2d at (Jones, concurring). Most recently the Alabama Supreme Court decided *Babcooke v. Duncan,* 20 ABR 1671 (1986), wherein it was held that a member of a suspect classification (an alien) could not be denied a commission as a notary public absent a showing of a compelling state interest for the denial. The reasoning of the Supreme Court of Alabama was based upon *Bernal v. Fainter,* 467 U.S. 216 (1984) whereby it was held that a statute of the State of Texas requiring notaries public to be citizens of the United States was violative the Equal Protection Clause of the 14th Amendment.

In *Turner v. Fouche,* 396 U.S. 346 (1970), this Court had before it a similar question. An attack was made in *Turner,* id., on a requirement of a statute of the State of Georgia that a person be a freeholder in order to qualify for appointment to a local school board. No compelling state interest was shown by the State of Georgia for this qualification. This court opined that the freeholder requirement was invalid even when measured by the traditional test of denial of equal protection. 396 U.S. at 362. The conclusion reached by this Court was that the freeholder requirement amounted to invidious racial discrimination:

> Without excluding the possibility that other circumstances might present themselves in which a property qualification for office-holding could survive constitutional scrutiny, we cannot say, on the record before us, that the present freeholder requirement for membership on the county board of education amounts to anything more than invidious discrimination.

396 U.S. at 363.

The Court of Civil Appeals of Alabama incorrectly applied a test of legislative deference in determining the validity of the enabling legislation in question. It was held that a rational basis existed for the "freeholder" qualification.

A classification based upon race is subject to a strict scrutiny test. *Korematsu v. United States,* 323 U.S. 214 (1944). Under the tests of *Korematsu,* id., and *Turner v. Fouche, supra,* any property qualification for office holding is valid only if a compelling state interest is shown for the qualification. In the instant case, there has been no showing of a compelling state interest. Thus, the classification established by the state enabling legislation cannot withstand constitutional muster.

Petitioners are requesting this Court to reverse the decisions of the courts below, holding the enabling legislation creating the Shelby County Commission invalid. The freeholder qualification contained in the enabling legislation is facially invalid in that its very purpose is to disqualify potential minority appointees to the Shelby County Planning Commission.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Supreme Court of Alabama should be granted, and the decisions below reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

THE STATE OF ALABAMA –
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1985-86

Ex parte: Jim B. McClendon and
Nancy P. McClendon

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CIVIL APPEALS

(In re: Jim B. McClendon
and Nancy P. McClendon
v.
Shelby County, et. al)

PER CURIAM:

The petition for writ of certiorari is denied.

In denying the petition for writ of certiorari, this Court does not wish to be understood as approving all the language, reasons, or statements of law in the Court of Civil Appeals' opinion. *Horsley v. Horsley,* 291 Ala. 782, 280 So. 2d 155 (1973).

WRIT DENIED.

Torbert, C. J., Faulkner, Almon, Beatty and Houston, JJ., concur.

APPENDIX B

JIM B. McCLENDON, et al,	*	IN THE CIRCUIT
	*	COURT FOR
Plaintiffs,	*	SHELBY COUNTY,
	*	ALABAMA
vs	*	
	*	CIVIL ACTION
SHELBY COUNTY, et al,	*	NUMBER
	*	CV-83-066
Defendant.	*	

JUDGMENT

I. The court has previously ruled on the "cul-de-sac" question in the judgment of June 20, 1984, but will now add the following comments on that issue.

Much of the plaintiffs' testimony was simply in conflict with what appeared in black and white on the said record map. Moreover, at the end of the actual turnaround there is no house standing in the way of the connection. Again, the court finds that this configuration is not a "cul-de-sac" in the sense contended by the plaintiffs, with the resulting legal effects as contended by the plaintiffs.

II. The judgment of June 20, 1984 set aside and held for nothing the Shelby County Planning Commission vote that had been appealed to this court. That judgment also stated that the McClendons could re-submit to the Shelby County Planning Commission their request that the Commission prohibit the proposed connection.

The plaintiffs chose to and did re-petition the Commission. The Shelby County Planning Commission – appointed and operating under Amended Act No. 82-693 and therefore as a different legal entity – denied the request. The Shelby County Planning Commission then filed its transcript of this July 17, 1984 Commission hearing. The plaintiffs then requested the

court to enter a final judgment. This request was made pursuant to plaintiffs' written "Motion to Enter Final Judgment and Tax Costs", and pursuant to an in camera conference the court held with the attorneys representing all parties in this action, at which conference plaintiffs' attorney again repeated the plaintiffs' desire that this court immediately enter a final judgment.

There was never, however, an evidentiary hearing on the Shelby County Planning Commission's decision which is actually before this court. It could then — and might be — argued that the plaintiffs have presented no evidence in support of their allegation that the Commission's decision to reject the plaintiffs' application was arbitrary, capricious, unlawful, etc.

Be that as it may, this court does not find — based upon the evidence presented, and based upon the court's two in-person visits to the two subdivisions in question, which visits included on-the-spot evaluation of the benefits to the community of the proposed connection as testified to at the previous evidentiary hearings, such as providing a straight line connection of the two subdivisions — that the action denying the request to prevent the connection was arbitrary, capricious, or unlawful.

III. Plaintiffs attempt also to raise the question of the constitutionality of Amended Act No. 82-693.

The Shelby County Planning Commission, which approved the record map in question and whose minutes of June 19, 1979, explicitedly [sic] approved the connection was declared unconstitutional by the Alabama Supreme Court on May 14, 1982, which ruling was final on June 29, 1982. (Plaintiffs' counsel in his letter to the Court of August 22, 1984, stated that the actions of the original Commission were therefore void.) Act No. 82-693 was subsequently passed, and it was the Shelby County Planning Commission which existed pursuant to this act — unamended — which initially denied the plaintiffs' request, and whose vote this court set aside in the judgment of June 20, 1984.

The present Shelby County Planning Commission, operating under and existing pursuant to Amended Act No. 82-693, did not give permission for this connection. Its ruling left matters in exactly the same legal state as they existed prior to the time the McClendons petitioned the present Shelby County Planning Commission.

The McClendons asked the Commission to prevent the connection. The Commission, however, refused to grant the McClendons' request. The effect of that refusal to take action simply maintained the status quo, whatever that is. (That issue was not raised.)

For the McClendons to assert, after the Commission refused their request to intervene, refused to change whatever status quo existed at the time this Commission came into being, that the Commission is unconstitutional is inconsistent. The effect of the constitutional challenge means that the plaintiffs asked the Commission to do something for them, and, when the Commission did not, they say that the Commission had no authority to do it anyway.

In this court's opinion, the McClendons should be estopped from asserting the unconstitutionality of Amended Act #82-693 in this proceeding. Such a challenge is self-contradictory, inconsistent, and without purpose. See also *Byrd Companies, Inc. v. Jefferson County,* 445 So. 2d 239 (1983). (The court communicated and discussed with the attorneys the question of estoppel.)

IV. The court has considered all of the issues raised by the plaintiffs as stated in the plaintiffs' brief of June 12, 1984, which brief was filed pursuant to the court's specific request to the plaintiffs to specify the issues they desired the court to rule on. The court finds and rules against the plaintiffs on the rest of the issues they presented to the court.

Wherefore, judgment is hereby entered in favor of the defendants and against the plaintiffs.

Costs are taxed to the plaintiffs.

DONE and ORDERED this 6 day of September, 1984.

/s/ ROBERT R. ARMSTRONG, JR.

Robert R. Armstrong, Jr.
Circuit Judge

Filed in office this the 6 day of September, 1984.

/s/ KYLE LANSFORD

Kyle Lansford
Clerk of Circuit Court
Shelby County, Alabama

APPENDIX C

THE STATE OF ALABAMA –
JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
SPECIAL TERM 1985

Civ. 4872

Jim B. McClendon and Nancy P. McClendon
v.
Shelby County, et al.

Appealed From Shelby County Circuit Court

WRIGHT, Presiding Judge

In January 1982 the McClendons contracted to buy Lot 8 in the Meadow Brook, 6th Sector Subdivision, paying earnest money of $10,000. They had visited the site several times prior to signing the contract. The street in front of the lot appeared to be a cul-de-sac with curbs and gutters in place. In March 1982, before the closing of the sale, the McClendons were informed that the Shelby County Planning Commission (SCPC) had authorized extending the street in front of their property to connect with a neighboring subdivision. The McClendons examined the record map of the area during this time and talked to one of the planning commissioners, who confirmed the extension of the street. In spite of this knowledge, the McClendons closed the sale of the property on April 30, 1982.

The McClendons then petitioned the SCPC to contest this extension. The petition asked the SCPC to "change the plans" that it had previously approved, which called for the extension. Having previously authorized the extension in an entirely separate action, it was understandably unsure of the proper way in which to address this petition. The SCPC ultimately decided to treat the petition as a request "for approval to vacate a 60-foot right-of-way behind [the alleged] cul-de-sac circle at North End of Colonial Park Road to block future connecting

road with Broken Bow Subdivision." We can find no objection in the record to the SCPC's characterization of this petition. In fact, one might say that this characterization was virtually ignored by the McClendons. The petition was denied.

An appeal was taken to the Shelby County Circuit Court. The circuit court found that one of the commissioners had acted improperly. The court set aside the SCPC's decision and allowed the McClendons to repetition the SCPC. The petition was again denied. A second appeal was taken to the circuit court, and this time the SCPC's decision was upheld. On appeal to this court, the McClendons make a number of arguments, most of which, it seems, would have more properly been made and addressed in a declaratory judgment action or perhaps even an independent action to contest the constitutionality of the act by which the SCPC was created. However, in acknowledgement of the time and energy expended on this case, by both the attorneys and the judiciary, we will address most of these arguments.

The McClendons' first and main contention is that the street in front of their property is a cul-de-sac as a matter of law. This contention, if correct, would arguably make the SCPC's decision wrong as a matter of law in that its characterization of the petition as a request "for approval to vacate" would be inaccurate. In essence, the argument is that approval of the connecting street would constitute an illegal taking of the McClendon's property without just and fair compensation. We, however, cannot agree with the McClendons' contention. The SCPC's characterization of both the street and the petition was correct. A diagram of the area will facilitate an understanding of this case.

[SEE EXHIBIT A ATTACHED]

We find substantial evidence in the record to support the proposition that the street in question is not a cul-de-sac. The subdivision regulations state clearly that a cul-de-sac is a *circle* with certain specified dimensions. The diagram clearly shows

that Colonial Park Road dead-ends at the boundary of the subdivision. There is no circle, but only an area to facilitate the turn around of automobiles or emergency vehicles as provided for by these same subdivision regulations. Moreover, there exists an actual cul-de-sac in the very same subdivision. The following diagram shows this to be a fully-closed circle surrounded by wedge-shaped lots.

[SEE EXHIBIT B ATTACHED]

Once a plat or map is recorded in the office of the probate court in the county where the land lies, the streets, avenues and highways are held to be dedicated to the public. § 35-2-51, Code of Alabama 1975. *See Talley v. Wallace,* 252 Ala. 96, 39 So. 2d 672 (1949). Once an area is dedicated, the parties who purchase surrounding lots are put on notice of such dedication. *Hoiles v. Taylor,* 278 Ala. 515, 179 So. 2d 148 (1965). Thus, in the present case, the entire street in question was dedicated to the public. This dedication included the entire area up to the actual boundary of the subdivision. As this map was recorded well before the McClendons purchased their property, they were put on notice of such dedication. Because of this, logically, the SCPC was correct in its characterization of the McClendons' petition as a request for *approval* to vacate. The SCPC does not have the power to actually vacate a public street. *See* §§ 23-4-1 to -20, Code of Alabama 1975.

We note that local governing authorities are presumed to have a superior opportunity to know and consider the general welfare of the area. *See Episcopal Foundation v. Williams,* 281 Ala. 363, 202 So. 2d 726 (1967); *Sanders v. Board of Adjustment,* 445 So. 2d 909 (Ala. Civ. App. 1983). The question becomes whether the decision of the planning commission, denying the McClendons' request, was arbitrary and capricious in that it was unrelated to the public health, safety, morals or general welfare. *City of Mobile v. Waldon,* 429 So. 2d 945 (Ala. 1983). The trial court held that the decision was not arbitrary and capricious. If supported by evidence, this decree

is favored with a presumption of correctness and is not to be disturbed, unless it is plainly or palpably wrong or manifestly unjust. *Hall v. Jefferson County,* 450 So. 2d 792 (Ala. 1984). Our standard of review, once a substantial relationship to the promotion of public health, safety or general welfare has been determined, is whether the SCPC's denial is found upon "fairly debatable" factual and policy issues. *See Hall v. Jefferson County, supra.*

We find ample evidence in the record before us to show that the decision had a substantial and obvious relation to the public health, safety, and general welfare of those persons in Shelby County. We also find that the decision was founded upon "fairly debatable" factual and policy issues. Testimony by witnesses, including that of experts, showed that the connecting road would improve fire and police protection, facilitate utility connection, reduce commuting time for residents and improve safety in the event of catastrophic fire or storm. Thus, the decision of the SCPC not to approve the McClendons' request was not arbitrary and capricious. The decision of the trial court was not plainly and palpably wrong and must be affirmed.

Incidentally, we note that any contention that the SCPC's decision at the first hearing was arbitrary and capricious would now be moot. Any error made in the first hearing has been cured by the second hearing and subsequent appeals.

Our decision that Colonial Park Road does not end in a cul-de-sac obviates the need to address the McClendons' argument concerning estoppel, the vested rights doctrine and 42 U.S.C. §§ 1983, 1988. As the property had already been properly dedicated to the public, there has been no deprivation or detriment to consider.

The McClendons attempt to make a number of arguments concerning the constitutionality of 1982 Ala. Acts 693, as amended by 1984 Ala. Acts 454. This act created the SCPC.

Counsel for the SCPC strongly argues, and we think correctly, that the rationale of the supreme court's decision in *Byrd Companies, Inc. v. Jefferson County,* 445 So. 2d 239 (Ala.

1983) should prevent the McClendons from requesting approval from the SCPC while at the same time and in the same action contesting the constitutionality of the act establishing such commission's authority. We note, however, without condoning the McClendons' methods as proper, that such a decision might cause an unnecessary waste of both judicial and attorney time and expense. As did the supreme court in *Byrd* then, we address the McClendons' main contentions.

The McClendons first argue that the act constitutes an unlawful delegation of legislative and judicial powers. Particularly, it is argued that section 14 of the act violates the doctrine of separation of powers.

A very good argument can be made that the McClendons have not established the necessary standing to contest the constitutionality of the act in question. There has been no argument made that would even suggest any "causal connection" between the injury they allege and the unconstitutionality of the act. Thus, there has been no showing that the McClendons would benefit personally from the court's intervention. *See Warth v. Seldin,* 422 U.S. 490, 508 (1975). In other words, we fail to see how striking section 14 of the act as unconstitutional will benefit the McClendons in any way. The street in question would still not be a cul-de-sac, and the McClendons will still not have complied with §§ 23-4-1 to -20, Code 1975.

We note, however, that the McClendons' argument must still fail on the merits. Only three powers are granted the SCPC by section 14. Two of these deal with special exceptions and variances, powers which have long been recognized as validly delegable. *See generally* Ala. Digest, *Zoning and Planning,* Key No. 484 (Supp. 1985), 101A C.J.S. *Zoning and Land Planning* §§ 228-29 (1979). The third, stated as the power "to hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by the Commission or official in the enforcement of this article or any regulation adopted pursuant thereto" is merely providing the SCPC with the power to reconsider its own decisions. It is generally recognized that an administrative agency has the power

to do this as long as the legislature has granted such authority. *See generally* 73A C.J.S. *Public Administrative Law and Procedure* § 161 (1983). Further the legislature of a state may delegate to an administrative body the power to make rules and decide particular cases. *State ex rel Dyer v. Sims,* 341 U.S. 22 (1951). This includes the power to delegate adjudicatory or quasi-judicial duties. *Ex parte Darnell,* 262 Ala. 71, 76 So. 2d 770 (1954). As noted in 73A C.J.S. *Public Administrative Law and Procedure* § 161 (1983):

> "Legislative acts granting to an administrative agency quasi-judicial power are valid, where the legislature has laid down the policy and established the standards while leaving to the agency the determination of facts to which the legislative policy is to apply.

See also Ball v. Jones, 272 Ala. 305, 132 So. 2d 120 (1960). *See generally* 73A C.J.S. *Public Administrative Law and Procedure* § 10b (1983). There has been no issue raised as to the validity, or lack thereof, of a clear standard to apply under section 14.

The McClendons also contend that the selection process for commissioners provided for by the act unlawfully discriminates in that it limits selection to resident "freeholders" of Shelby County. We cannot agree.

The basic tenet of the equal protection clause is that all persons similarly situated must be treated equally. *Eagerton v. Gulas Wrestling Enterprises, Inc.,* 406 So. 2d 366 (Ala. 1981). It does not, however, require that a statute necessarily apply equally to all persons or require that things different in fact be treated in law as though they were the same. *Hall v. McBride,* 416 So. 2d 986 (Ala. 1982). *Eagerton v. Gulas Wrestling Enterprises, Inc., supra.*

We note that there has been no argument that either a fundamental right or a suspect classification is involved in the present case. Thus, the only question is whether the classification bears a rational relation to a legitimate state interest. *Board of Trustees of Policemen's and Fireman's Retirement*

Fund v. Cardwell, 400 So. 2d 402 (Ala. 1981); *Madison v. Lambert,* 399 So. 2d 840 (Ala. 1981). *See also Pappanastos v. Board of Trustees of University of Alabama,* 615 F. 2d 219 (5th Cir. 1980).

The McClendons argue that the classification in the present case is irrational, because in two hypothetical situations such a classification does not make logical sense. We must simply ask whether "any state of facts reasonably may be conceived to justify the challenged qualification. *McGowan v. Maryland,* 366 U.S. 420 (1961). *Accord Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973); *Pappanastos, supra.* Thus, if it can be reasonably concluded that the "freeholder" qualification promotes a legitimate state interest. it must be sustained. *See Exxon Corp. v. Eagerton,* 462 U.S. 176, *on remand Eagerton v. Exchange Oil and Gas Corp.,* 440 So. 2d 1031 (Ala. 1983). A similar test would be applied to any challenge based on a denial of due process. *See Jones v. Alabama State Docks,* 443 So. 2d 902 (Ala. 1983); *Juneman Electric, Inc. v. Cross,* 414 So. 2d 108 (Ala. Civ. App. 1982).

We cannot say that it is irrational for the legislature to conclude that, for the most part, those persons having the greatest interest in landplanning in Shelby County, i.e., freeholders, should not also be the persons best qualified to make landplanning decisions. In fact, it is quite logical for the legislature to make such a conclusion. The rationale for such a conclusion is similar to that used in establishing the aforementioned presumption that local governing bodies have a superior opportunity to know and consider the interests involved and to consider the general welfare of the area involved. *Cf. Sanders v. Board of Adjustment, supra.* We, therefore, uphold the act.

In view of our decision on the first issue, and the fact that it was not discussed in brief by either party, we discern no reason to determine if § 6-6-227, Code of Alabama 1975, applies in this case as in the recent cases of *Barger v. Barger,* 410 So. 2d 17 (Ala. 1982) and *Guy v. Southwest Alabama Council on*

Alcoholism, [Ms. August 21, 1985] ____ So. 2d ____ (Ala. Civ. App. 1985).

In light of the foregoing, we are of the opinion that the trial court's decision that the SCPC has not acted arbitrarily or capriciously in denying the McClendons' petition was correct. Further, there is no sound challenge that can be made to the constitutionality of Act No. 82-693, as amended by Act No. 84-454. We are therefore of the opinion that the trial court's decision is due to be affirmed.

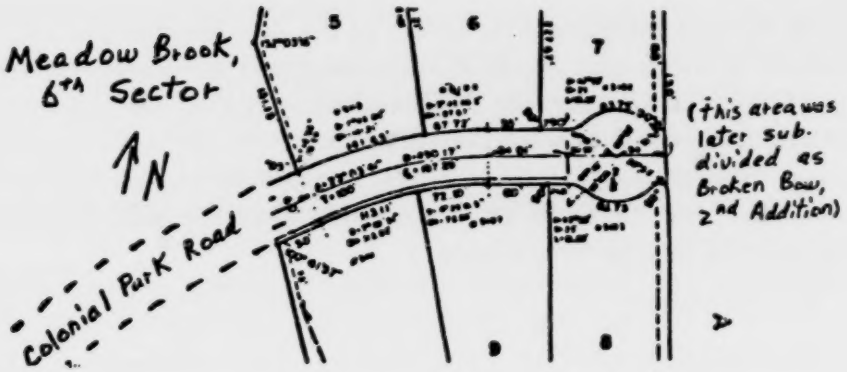
AFFIRMED

HOLMES, J., concurs; BRADLEY, J., concurs specially

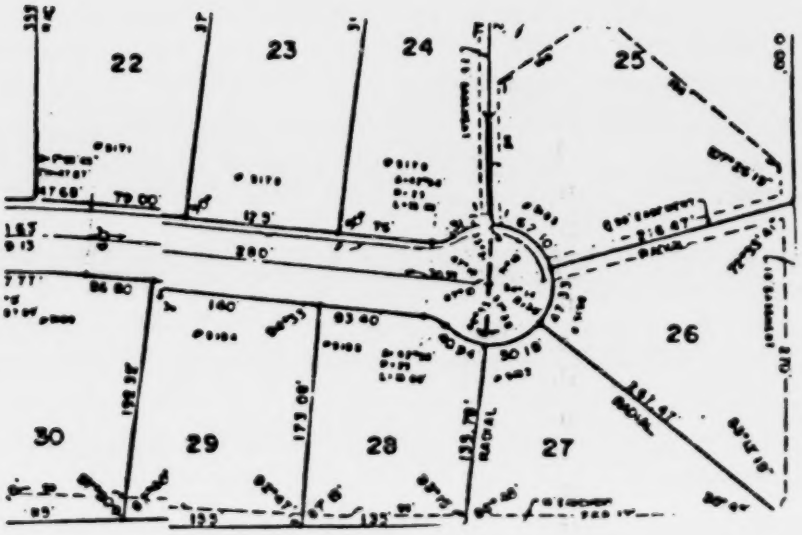
BRADLEY, J., concurring specially:

I agree with the majority that the first issue decided, i.e. that the street in front of the McClendons' property is not a cul-de-sac as a matter of law, is dispositive of the appeal. Consequently, I see no need to consider the constitutional issues presented or whether they were properly presented to the trial court. *See Guy v. Southwest Alabama Council on Alcoholism, et. al.,* [Ms. August 21, 1985] ____ So. 2d ____ (Ala. Civ. App. 1985). Hence, I do not agree or disagree with the decision in this aspect of the case.

APPENDIX C – EXHIBIT A



APPENDIX C – EXHIBIT B



APPENDIX D

Amendment 14 to the United States Constitution provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1982 Ala. Acts No. 693 provides in pertinent part:

Section 2. Personnel of the Shelby County Planning Commission. The Commission shall be composed of seven members, all of whom shall be over the age of 25 years and each of whom shall be a qualified elector in and an actual resident of and a free-holder in Shelby County who resides outside the corporate limits of any municipality therein. Two of the members shall be appointed by the Shelby County Commission, two shall be appointed by the Shelby County Board of Education, two shall be appointed by the Shelby County Bar Association, and one shall be appointed by the Judge of the Circuit Court of Shelby County. Not over two members of the Commission shall come from any one beat of the County. Each member shall serve a term of six years and until his successor is duly appointed and qualified. Prior to taking office each member shall subscribe to an oath as provided by law for public officials and the same shall be recorded in the Probate Office of Shelby County. The original members of this Commission shall draw lots to determine the period of time each is to serve and the terms of two shall expire two years from the date of the organization of the Commission, the terms of two shall expire four years from the date of the organization of the Commission and the terms of three shall expire six years from the date of the organization of the Commission. In the event of a vacancy on

the Commission the same shall be filled as in the case of the original appointment. All members shall serve without compensation, and the members shall hold no other county office. However, reasonable and necessary expenses of the members shall be paid from the General Fund of Shelby County.

1984 Ala. Acts No. 454 provides in pertinent part:

Section 2. Personnel of the Shelby County Planning Commission. The commission shall be composed of seven members, all of whom shall be over the age of 25 years and each of whom shall be a qualified elector in and an actual resident of and a free-holder in Shelby County who resides outside the corporate limits of any municipality therein. All members shall be appointed by the Shelby County Commission, and shall serve at the pleasure of Shelby County Commission. Not over two members of the commission shall come from any one beat of the County. Each member shall serve a term of six years and until his successor is duly appointed and qualified. Prior to taking office each member shall subscribe to an oath as provided by law for public officials and the same shall be recorded in the office of the Judge of Probate of Shelby County. The original members of this commission shall draw lots to determine the period of time each is to serve and the terms of two shall expire two years from the date of the organization of the commission; the terms of two others shall expire four years from the date of the organization of the commission; and the terms of three others shall expire six years from the date of the organization of the commission. In the event of a vacancy on the commission the same shall be filled as in the case of the original appointment. All members shall be reimbursed reasonable and necessary expenses incurred and shall be paid not less than fifty dollars per month as set by the county commission. Members shall hold no other county office and members shall be paid from the General Fund of Shelby County.

1965 Ala. Acts No. 816 provides in pertinent part:

Section 2. Personnel of the Shelby County Planning Commission. The Commission shall be composed of seven members, all of whom shall be over the age of 25 years and each of whom shall be a qualified elector in and an actual resident of and a free-holder in Shelby County who resides outside the corporate limits of any municipality eherein. Two of the members shall be appointed by the Board of Revenue and Control of Shelby County, two shall be appointed by the Shelby County Board of Education, two shall be appointed by the Shelby County Bar Association, and one shall be appointed by the Judge of the Circuit Court of Shelby County. Not over two members of the Commission shall come from any one beat of the County. Each member shall serve a term of six years and until his successor is duly appointed and qualified. Prior to taking office each member shall subscribe to an oath as provided by law for public officials and the same shall be recorded in the Probate Office of Shelby County. The original members of this Commission shall draw lots to determine the period of time each is to serve and the terms of two shall expire two years from the date of the organization of the Commission, the terms of two shall expire four years from the date of the organization of the Commission and the terms of three shall expire six years from the date of the organization of the Commission. In the event of a vacancy on the Commission the same shall be filled as in the case of the original appointment. All members shall serve without compensation, and the members shall hold no other county office. However, reasonable and necessary expenses of the members shall be paid from the General Fund of Shelby County.

Supreme Court, U.S.
FILED
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No. 85-1788

IN THE

Supreme Court Of The United States

October Term, 1985

JIM B. McCLENDON and NANCY P. McCLENDON,
Petitioners,

v.

SHELBY COUNTY, ALABAMA, A Political Subdivision of the State of Alabama; The COUNTY COMMISSION OF SHELBY COUNTY, ALABAMA; the PLANNING COMMISSION OF SHELBY COUNTY, ALABAMA, A Body Corporate and Political Subdivision of the State of Alabama; and SCOTCH BUILDING AND DEVELOPMENT COMPANY, a Corporation Organized and Existing Under the Laws of the State of Alabama,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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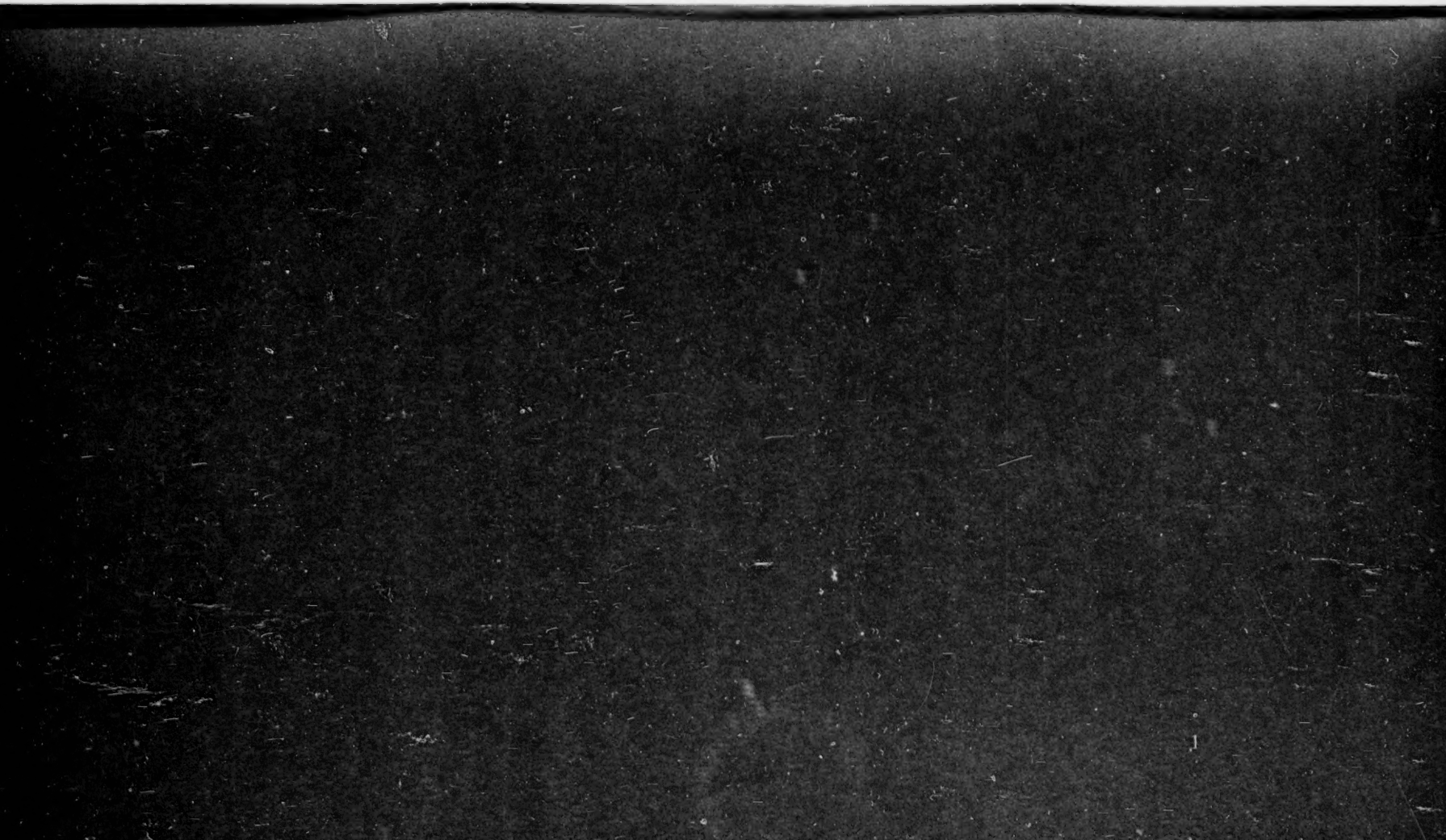

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Petitioners in this case have the necessary "standing" to litigate for the relief which they seek.

II. Whether the "freeholder" requirement for appointment to the Shelby County Planning Commission is unconstitutional as violative of the Fourteenth Amendment to the United States Constitution.

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JIM B. McCLENDON and NANCY P. McCLENDON,
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SHELBY COUNTY, ALABAMA, A Political Subdivision of the State of Alabama; The COUNTY COMMISSION OF SHELBY COUNTY, ALABAMA; the PLANNING COMMISSION OF SHELBY COUNTY, ALABAMA, A Body Corporate and Political Subdivision of the State of Alabama; and SCOTCH BUILDING AND DEVELOPMENT COMPANY, a Corporation Organized and Existing Under the Laws of the State of Alabama,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

STATEMENT OF THE CASE

The Shelby County Planning Commission[1] is a public body vested with certain zoning, subdivision, and land planning du-

[1]The entity referred to in Petitioners' caption as "Planning Commission of Shelby County, Alabama" should more correctly be denominated as the "Shelby County Planning Commission" pursuant to the Alabama Acts cited herein.

Shelby County, Alabama, is a political and geographical subdivision of the State of Alabama, originally established by Act of the Alabama Legis-

ties and responsibilities in and for Shelby County, Alabama, by virtue of authority of 1982 Ala. Acts No. 693, as amended by 1984 Ala. Acts No. 454 (see pertinent portions of these acts reprinted as Appendix 1 in this Brief).

The Petitioners heretofore contracted to buy a subdivision lot in Shelby County, Alabama, fronting on a street known as "Colonial Park Road". The subdivision map showing the parameters of the street had previously been recorded in the Office of the Probate Court in Shelby County, Alabama, where the land is situated, and hence, the street had already been dedicated to the public as a public street (under Alabama Law: See Sec. 35-2-51, *Code of Alabama 1975*, reprinted in Appendix 2 in this Brief. See also Pet. Appendix C, p. A-8).

Before they closed the purchase of their lot, and before they received a deed to their property, Petitioners learned that the Shelby County Planning Commission had authorized an extension of Colonial Park Road to the east, to connect with another street in a new, adjoining subdivision. Nonetheless, in spite of this knowledge, they closed the sale of their property and thereafter petitioned the Planning Commission to contest the street extension which had already been approved. See Pet. Appendix C, pp. A-6,7.

Quoting from the opinion of the Court of Civil Appeals of Alabama, *McClendon v. Shelby County, et al.* (See Pet. Appendix C, pp. A-6,7, and now officially reported at 484 So. 2d 459, 461):

> "The petition asked the SCPC to 'change the plans' that it had previously approved, which called for the extension. Having previously authorized the extension in an entirely separate action, it was understandably unsure of the proper way in which to address this petition. The SCPC ultimately decided to treat the petition as a request 'for approval to vacate a 60-foot right of way behind (the alleged) cul-

---

lature on February 17, 1818, and recognized as such by the Constitution of Alabama of 1901. The Shelby County Commission, composed of elected representatives, exists by authority of *Code of Alabama 1975*, 11-3-1 to 25, and has general executive functions, powers and duties in and for Shelby County, Alabama.

de-sac circle at North End of Colonial Park Road to block future connecting road with Broken Bow Subdivision.' We can find no objection in the record to the SCPC's characterization of this petition. In fact, one might say that this characterization was virtually ignored by the McClendons. The petition was denied.

An appeal was taken to the Shelby County Circuit Court. The circuit court found that one of the commissioners had acted improperly. The court set aside the SCPC's decision and allowed the McClendons to repetition the SCPC. The petition was again denied. A second appeal was taken to the circuit court, and this time the SCPC's decision was upheld. . ."

The trial court's judgment is shown as Petitioners' Appendix B, pp. A-2-5, and Petitioners appealed to the Court of Civil Appeals of Alabama.

On appeal, the Petitioners'

". . . first and main contention is (was) that the street in front of their property is a cul-de-sac as a matter of law. This contention, if correct, would arguably make the SCPC's decision wrong as a matter of law in that its characterization of the petition as a request "for approval to vacate" would be inaccurate. In essence, the argument is that approval of the connecting street would constitute an illegal taking of the McClendon's property without just and fair compensation (Pet. Appendix C, p. A-7) . . ."

The Alabama Court of Civil Appeals held that since the street in question did *not* end in a circle, but rather "dead-ends at the boundary of the subdivision", it was *not* a cul-de-sac, as a matter of law (and hence *could* be extended into the adjoining subdivision). The Court further said

"The SCPC does not have the power to actually vacate a public street. *See* Sec. 23-4-1 to 20, *Code of Alabama 1975* (Pet. Appendix C, p. A-8; See also Appendix 3 in this Brief)."

While noting that

"Our decision that Colonial Park Road does not end in a cul-de-sac obviates the need to address the McClendons'

> argument concerning estoppel, the vested rights doctrine and 42 U.S.C. Sec. 1983, 1988 . . . (Pet. Appendix C, p. A-9)"

the Alabama Court of Civil Appeals did, nevertheless, address other points at issue, including the inconsistency of Petitioners' position in seeking relief from the Shelby County Planning Commission while simultaneously and in the same action contesting the constitutionality of the act establishing such commission's authority . . . and including the issues of standing, delegation of power, and "freeholder." See Pet. C, pp. A-9-13.

The Court of Civil Appeals of Alabama affirmed the judgment in the Court below in favor of the Respondents (Pet. Appendix C), and the Supreme Court of Alabama subsequently denied Petitioners' Application for Writ of Certiorari (Pet. p. 3). *McClendon v. Shelby County*, 484 So. 2d 459, certiorari denied, 484 So. 2d 465 (1986).

REASONS FOR DENYING THE WRIT

I. Petitioners Lack "Standing"

The Petitioners have no "standing" in this case to invoke jurisdiction of this Honorable Court on the question which they seek to present, i.e., whether an eligibility requirement imposed by state law that a member of the Shelby County Planning Commission be a "freeholder" is in violation of the equal protection clause of the Fourteenth Amendment.

Petitioners are themselves "freeholders" (Pet. Appendix C, p. A-6) and hence are not members of the class of persons whom they argue are subject to unlawful discrimination. Clearly, they are owners of real property in Meadowbrook Subdivision in Shelby County, albeit, disenchanted property owners, and certainly are eligible to become members of the administrative body they challenge.

Further, petitioners assert in their first "Reason for Granting The Writ", that

> "A freeholder qualification has been recognized as racially discriminatory under state court decisions and the decisions of this Court . . ." (Pet. p. 4),

and cite *Korematsu v. United States,* 323 U.S. 214 (1944), for the proposition that

> ". . . A classification based upon race is subject to a strict scrutiny test . . ." (Pet. p. 6).

But in this case here before the Court, nothing in the record shows, nor do Petitioners allege, nor have they ever alleged, that *they* are members of any racial minority . . .

The case of *Turner v. Fouche,* 396 U.S. 346 (1970) cited in Petitioner's Brief (Pet. p. 5) is another race-discrimination case in which two Negro plaintiffs challenged the constitutionality of state statutes which resulted in the appointment of an all-white local school board, and this Court in that case clearly recognized the question of *standing* as being a threshold issue. The opinion states, in footnote 23,

> "Georgia's contention that no appellant has standing to raise this claim is without merit. The appellant Calvin Turner is a freeholder, but the appellant Joseph Heath is not. Heath's motion to intervene was granted by the District Court for the express purpose of adding a party plaintiff to the case to ensure that the court could reach the merits of this issue . . ."

Petitioners also cite *Babcooke v. Duncan,* 20 ABR 1671 (Ala. 1986) and *Bernal v. Fainter,* 467 U.S. 216 (1984), Pet. p. 5, both cases holding that aliens may not be denied Notary Public commissions under the equal protection clause of the Fourteenth Amendment. But in both of those cases, the petitioners were clearly aliens, and as such, had proper standing to litigate the issues involved . . .

The Court of Civil Appeals of Alabama observed that

> "A very good argument can be made that the McClendons have not established the necessary standing to contest the constitutionality of the act in question. There has been no argument made that would even suggest any

> "causal connection" between the injury they allege and the unconstitutionality of the act. Thus, there has been no showing that the McClendons would benefit personally from the court's intervention. See *Warth v. Seldin,* 422 U.S. 490, 508 (1975). In other words, we fail to see how striking section 14 of the act as unconstitutional will benefit the McClendons in any way. The street in question would still not be a cul-de-sac, and the McClendons will still not have complied with Sections 23-4-1 to 20, *Code 1975* (Pet. Appendix C, p. A-10; see also Appendix C in this Brief for Code sections pertaining to vacating public streets) . . .".

In this case, Colonial Park Road was shown on the recorded subdivision map as being a public street all the way to the eastern boundary of the subdivision at the time Petitioners bought their lot. The Petitioners claimed in the Alabama Courts, however, that Colonial Park Drive *was a closed cul-de-sac, as a matter of law, and could not, as a matter of law, be extended eastward beyond the subdivision boundary.*

Having "lost" that issue under applicable state law — where no federal questions or issues were involved in any way — the Petitioners cannot now, and could *never,* obtain any relief whatsoever from the Shelby County Planning Commission. The Shelby County Planning Commission has *never* had the authority to close or vacate a street; under state law, streets in Alabama may be lawfully vacated only in accordance with the procedures outlined in Sections 23-4-1 to -20, *Code of Alabama 1975* (see these sections reprinted in Appendix 3 in this Brief).

The granting of the Writ which Petitioners seek would be absolutely unavailing to them in this case . . . the Shelby County Planning Commission cannot and could not help them, regardless of whether its members are composed of "freeholders", or "non freeholders", or some combination of both . . .

Quoting from *Warth v. Seldin,* 422 U.S. 490, 508, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975):

> "We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete

> facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger v. Reservists to Stop the War,* 418 U.S., at 221-222 . . ."

The Petitioners here are unable to present that "demonstrable, particularized injury . . .". They have no personal stake in the outcome of this litigation, and hence have no standing.

This court has, in numerous cases, held lack of standing to be a jurisdictional limitation on federal judicial review. The alleged injury must be "fairly traceable" to the challenged action; relief from the injury must be "likely" to follow from a favorable decision, and one litigant is generally prohibited from raising another person's legal rights. *Allen v. Wright,* 104 S. Ct. 3315, 82 L. Ed. 2d 556, rehearing denied 105 S. Ct. 51, 82 L. Ed. 2d 942, and *Regan v. Wright,* 105 S. Ct. 52, 82 L. Ed. 2d 942 (1984).

The controversy must be real, earnest, and vital, and the party who seeks to invoke the Court's authority must show that he has suffered some injury-in-fact resulting from action which he seeks to have the Court adjudicate. *Valley Forge Christian College v. Americans For Separation of Church and State, Inc.,* 102 S. Ct. 752, 758, 454 U.S. 464, 70 L. Ed. 2d 700 (1982).

Here, the Petitioners seek to have this Honorable Court decide an abstract issue, insofar as they are personally concerned. They are not within the category of potential parties who might be aggrieved or prejudiced, since they, themselves, are property-owners, or "freeholders". Relief for the Petitioners can *only* come by vacating a public street, and the Shelby County Planning Commission simply does not have the authority or power to vacate streets . . . and, hence, Petitioners have no "standing" to litigate for the relief which they seek.

II. "Freeholder" Qualification Is Not Unconstitutional

On the question of whether or not the "freeholder" qualification for appointment to the Shelby County Planning Commission is unconstitutional, the Respondents submit that the Court of Civil Appeals of Alabama stated correct law when it addressed the question in its opinion (Pet. Appendix C, pp. A-11,12):

> "The McClendons also contend that the selection process for commissioners provided for by the act unlawfully discriminates in that it limits selection to resident "freeholders" of Shelby County. We cannot agree.
>
> The basic tenet of the equal protection clause is that all persons similarly situated must be treated equally. *Eagerton v. Gulas Wrestling Enterprises, Inc.*, 406 So. 2d 366 (Ala. 1981). It does not, however, require that a statute necessarily apply equally to all persons or require that things different in fact be treated in law as though they were the same. *Hall v. McBride*, 416 So. 2d 986 (Ala. 1982). *Eagerton v. Gulas Wrestling Enterprises, Inc.*, supra.
>
> We note that there has been no argument that either a fundamental right or a suspect classification is involved in the present case. Thus, the only question is whether the classification bears a rational relation to a legitimate state interest. *Board of Trustees of Policemen's and Fireman's Retirement Fund v. Cardwell*, 400 So. 2d 402 (Ala. 1981); *Madison v. Lambert*, 399 So. 2d 840 (Ala. 1981). See also *Pappanastos v. Board of Trustees of University of Alabama*, 615 F. 2d 219 (5th Cir. 1980).
>
> The McClendons argue that the classification in the present case is irrational, because in two hypothetical situations such a classification does not make logical sense. We must simply ask whether "any state of facts reasonably may be conceived to justify the challenged qualification. *McGowan v. Maryland*, 366 U.S. 420 (1961). *Accord Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973); *Pappanastos, supra.* Thus, if it can be reasonably concluded that the "freeholder" qualification promotes a legitimate state interest, it must be sustained. See *Exxon Corp. v. Eagerton*, 462 U.S. 176, *on*

regard Eagerton v. Exchange Oil and Gas Corp., 440 So. 2d 1031 (Ala. 1983). A similar test would be applied to any challenge based on a denial of due process. *See Jones v. Alabama State Docks*, 443 So. 2d 902 (Ala. 1983); *Juneman Electric, Inc. v. Cross*, 414 So. 2d 108 (Ala. Civ. App. 1982).

We cannot say that it is irrational for the legislature to conclude that, for the most part, those persons having the greatest interest in landplanning in Shelby County, i.e., freeholders, should not also be the persons best qualified to make landplanning decisions. In fact, it is quite logical for the legislature to make such a conclusion. The rationale for such a conclusion is similar to that used in establishing the aforementioned presumption that local governing bodies have a superior opportunity to know and consider the interests involved and to consider the general welfare of the area involved. *Cf. Sanders v. Board of Adjustment, supra.* We, therefore, uphold the act . . ."

In addition, those challenging the legislative judgment must convince the Court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decision-maker; and if the question is at least debatable, the legislative judgment must be sustained. *Vance v. Bradley*, 440 U.S. 93, 111, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979); *Metropolitan Life Insurance Company v. Forrester*, 437 So. 2d 535 (Ala. Civ. App. 1983); See also, *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). In fact, the wisdom of the legislation or whether it will accomplish its purpose is not the question. *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963). The classification must be sustained.

The Petitioners have still not shown any "fundamental right" interference or any "suspect class" disadvantage involvement in this case. There is certainly "a rational relation to a legitimate state interest," for the reasons set forth in the opinion of the Court of Civil Appeals of Alabama quoted in this case, and Petitioners' position must fail, on its lack of merits. See *Parhan v. Hughes*, 99 S. Ct. 1742, 441 U.S. 347, 60 L. Ed. 2d 269 (1979); *Trimble v. Gordon*, 430 U.S. 762, 777, 97 S. Ct.

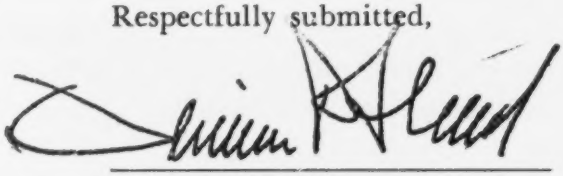
1459, 1468, 52 L. Ed. 2d 31 (1977); *City of New Orleans v. Dukes*, 96 S. Ct. 2513, 427 U.S. 297, 49 L. Ed. 2d 511, on remand 537 F. 2d 856 (1976); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 2566, 49 L. Ed. 2d 520 (1976).

CONCLUSION

For the foregoing reasons, the Petitioners have no standing in this cause to obtain relief from this Honorable Court on the issue which they seek to raise. In addition, their position on the merits of such issue is not well taken, under applicable law.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDICES

APPENDIX 1

1982 Ala. Acts No. 693, as amended by 1984 Ala. Acts No. 454, provide in pertinent part:

AN ACT

To amend the title and sections 1, 2, 5, 6, 8, 9, 10, 11, 12, 13 and 15 of Act No. 82-693, H. 57 of the Second Special Session of 1982 (Acts 1982, p. 144) which created and established the Shelby County Planning Commission, so as to provide further for the membership, organization, authority and function of the commission and to specifically repeal section 16 of said act which provided for ratification, validation and approval of Act No. 816 approved September 2, 1965 and actions taken by the Shelby County Planning Commission, officials and electors of the county as of the date they were taken.

Be It Enacted by the Legislature of Alabama:

Section 1. The title and sections 1, 2, 5, 6, 8, 9, 10, 11, 12, 13 and 15 of Act No. 82-693, H. 57 of the Second Special Session of 1982 (Acts 1982, p. 144) are hereby amended to read as follows:

An Act to create the Shelby County Planning Commission; to provide for the organization membership, powers, personnel, jurisdiction, and financial and legal status of such commission; to authorize the commission to make subdivision regulations, a master plan, and to adopt zoning regulations for the development of Shelby County; to provide for an election in each beat prior to the application of such zoning authority of the commission in each beat; to grant the commission power to zone certain areas within the county and provide a procedure for the amendment of zoning regulations; to prohibit zoning regulations from being retroactive; to provide remedies for the enforcement of the provisions of this Act; to provide exceptions to such zoning regulations and for appeals from the decisions of the commission.

Section 1. There is hereby created a Planning Commission for Shelby County, Alabama which commission shall be appointed as hereinafter provided and shall have responsibilities and duties as are stated herein. The term "commission" as used herein shall mean the Shelby County Planning Commission and the term "county commission" as used herein shall mean the Shelby County Commission or its successors.

Section 2. Personnel of the Shelby County Planning Commission. The commission shall be composed of seven members, all of whom shall be over the age of 25 years and each of whom shall be a qualified elector in and an actual resident of and a free-holder in Shelby County who resides outside the corporate limits of any municipality therein. All members shall be appointed by the Shelby County Commission, and shall serve at the pleasure of Shelby County Commission. Not over two members of the commission shall come from any one beat of the County. Each member shall serve a term of six years and until his successor is duly appointed and qualified. Prior to taking office each member shall subscribe to an oath as provided by law for public officials and the same shall be recorded in the office of the Judge of Probate of Shelby County. The original members of this commission shall draw lots to determine the period of time each is to serve and the terms of two shall expire two years from the date of the organization of the commission; the terms of two others shall expire four years from the date of the organization of the commission; and the terms of three others shall expire six years from the date of the organization of the commission. In the event of a vacancy on the commission the same shall be filled as in the case of the original appointment. All members shall be reimbursed reasonable and necessary expenses incurred and shall be paid not less than fifty dollars per month as set by the county commission. Members shall hold no other county office and members shall be paid from the General Fund of Shelby County.

Section 3. Jurisdiction of Commission. The jurisdiction of the Commission shall extend to all areas of the county outside the boundaries of municipal corporations; provided, however,

that where a municipality now or in the future is authorized to exercise and does in fact exercise planning and zoning powers in any area outside its municipal boundaries, such areas shall be excluded from the jurisdiction of the county planning commission.

Section 4. Organization and rules. The Commission shall elect its chairman and create and fill such other offices as it may determine. The term of chairman shall be for one year, with eligibility for re-election. The commission shall normally hold at least one regular meeting each month. It shall adopt by-laws for the transaction of business and shall keep a record of its resolutions, transaction of business, which record shall be a public record. Five of the members shall constitute a quorum to transact the business of the Commission.

Section 5. Staff and Finances. The county commission may appoint, promote, demote, and remove employees of the commission as it deems necessary. The county commission may also contract with county or city planners, engineers, architects, and other consultants and with any local, state, or federal agency for such services as the commission may require. The county commission may cooperate with and accept funds from Federal, state and local public or semi-public agencies, private individuals or corporations, and may expend such funds and carry out such cooperative undertakings and contracts for necessary planning studies. The expenditures of the commission, exclusive of gifts, grants, or contract receipts, shall be within the amounts appropriated for the purpose by the county commission.

Section 6. General Power and Duties of the Commission. It shall be the function and duty of the commission to make and maintain in an up-to-date manner a master plan of various areas of the county as and when deemed necessary by the commission and to adopt with the approval of the county commission appropriate zoning regulations as provided by Section 10 of this act for the physical development of Shelby County; provided, however, that the adoption of a master plan shall not be deemed a prerequisite to the administration and enforce-

ment of the zoning regulations. Such plan and regulations with the accompanying maps, plats, charts, and descriptive material shall show the commission's recommendations for the use and development of the territory of the county. The zoning regulations shall also include a zoning plan for selected areas for the control of the height, area, bulk, location, and use of buildings and land. As the work of making the whole master plan and preparation of zoning regulations progresses, the commission may from time to time adopt and publish a part or parts thereof, any such part to cover one or more major sections or divisions of the county. The commission may from time to time amend, extend, or add to the plan or regulations as hereinafter provided. Nothing in this Act shall be construed to impair the right of eminent domain conferred on railroads and utilities, both public and private, or their right to construct, use and maintain structures reasonably required in the public service or their right to exercise authority conferred by statutes, franchises, certificates of convenience and necessity, licenses, easements or conveyances.

Section 7. Purposes in View. In the preparation of the master plan and zoning regulations, the commission shall make careful and comprehensive surveys and studies of the present conditions existing within the county with due regard to existing agricultural uses, to land by virtue of its fertility, proximity to water supplies, and other geographical features is particularly suited to agricultural uses, to neighboring municipalities, towns and villages, to the growth of subdivisions, to the general population growth of the county, and make adequate provision for traffic, recreational areas and industry, and other public requirements. The plan and zoning regulations should be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the county, which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development, and should promote safety from fire, flood and other dangers, the healthful and conve-

nient distribution of population, and the wise and efficient expenditure of public funds. The plan and regulations shall be a public record, but its purpose and effect shall be to aid the planning commission in the performance of its duties, including making recommendations to the county governing body and assisting cooperating with other federal, state and local agencies so as to achieve coordinated, adjusted, and harmonious development.

Section 9. Subdivision Regulations. The commission with the approval of the county commission shall adopt a code of regulations applicable to the subdivision of land and plats of subdivisions shall not, after the adoption of such code of regulations, be accepted for filing and recording in the office of the judge of probate until they have been approved in a manner to be designated by the commission. The provisions of this section shall apply within the jurisdiction of the commission as specified in Section 3 of this act.

Section 10. Zoning; Grant of Power. For the purpose of promoting the health, safety, morals, convenience, order, prosperity and general welfare of the county, the commission with the approval of the county commission is hereby empowered to divide the portion of the county within its zoning jurisdiction into districts of such number, shape and area as may be found best suited to carry out the purposes of this act, and to provide within such districts for standards relating to the use of the land and the types and kinds of structures that may be erected in such districts, and all home remodeling or modification in such districts. Such provision shall be made in accordance with a comprehensive plan for the area involved and shall be designed to lessen congestion in the streets and highways; to secure safety from fire, flood, panic and other dangers; to provide health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue mixed use of land; to facilitate the adequate provision of transportation, water supply, sewerage, schools, parks and other public requirements. Such provision shall be made with reasonable consideration, among other things, of the character

of the land and district and its peculiar suitability for particular uses and with a view of promoting desirable living conditions, sustaining the stability of neighborhoods, protecting property against blight and depreciation, securing economy in governmental expenditures, conserving the value of buildings; and encouraging the most appropriate use of land and of buildings and structures throughout the jurisdiction of the commission. For the purpose of providing for the division of the territory into districts, consonant with the conditions provided in this section, the commission may make a single zoning plan for all the territory of the area which lies within its jurisdiction or may make and certify separate and successive zoning plans for parts of such territory which it deems suitable for urban or suburban development or which for other reasons it deems to have appropriate territorial unity for a zoning plan; and correspondingly any zoning regulations enacted by the commission may cover and include the whole territory lying within its jurisdiction or such territory as the commission deems to be appropriate territorial unit for a zoning plan.

APPENDIX 2

(SUBDIVISIONS RECORDING OF SUBDIVISION MAPS)

ARTICLE 3.

TOWN SURVEYS, PLATS OR MAPS, ETC.

§ 35-2-50. Survey required; what plat or map must show.

Any person, or his administrator, executor or guardian, desiring to subdivide his lands into lots shall cause the same to be surveyed by a competent surveyor, if not already surveyed, and shall cause a plat or map thereof to be made, showing the subdivisions into which it is proposed to divide the same, giving the length and bearings of the boundaries of each lot and its number; and, if it is the purpose of the owner to divide the lands into town lots, such plat or map shall show the streets, alleys and public grounds and give the bearings, length, width and name of each street, as well as the number of each lot and block. Such plat or map must show the relation of the lands so platted or mapped to the government survey. (Code 1896, § 3899; Code 1907, § 6028; Code 1923, § 10357; Code 1940, T. 56, § 12.)

§ 35-2-51. Certification, acknowledgment and recordation of plat or map; copies as evidence; conveyance.

(a) The plat or map having been completed shall be certified by the surveyor, which certificate must also be signed by the owner, his duly authorized agent or attorney, executor, administrator or guardian and acknowledged by such owner, agent or attorney, in the same manner in which deeds are required to be acknowledged. The plat or map, together with the certificate of the surveyor and acknowledgment, shall be recorded in the office of the judge of probate in the county in which the lands are situated, in a suitable book to be kept for that purpose; and such acknowledgment and record shall have

like effect and certified copies thereof and of such plat or map may be used in evidence to the same extent and with like effect as in the case of deeds.

(b) The acknowledgment and recording of such plat or map shall be held to be a conveyance in fee simple of such portion of the premises platted as are marked or noted on such plat or map as donated or granted to the public, and the premises intended for any street, alleyway, common or other public use, as shown in such plat or map, shall be held in trust for the uses and purposes intended or set forth in such plat or map. (Code 1896, §§ 3900, 3901; Code 1907, §§ 6029, 6030; Code 1923, §§ 10358, 10359; Code 1940, T. 56, §§ 13, 14.)

APPENDIX 3

CLOSING AND VACATING STREETS, ALLEYS AND HIGHWAYS.

ARTICLE 1.

COUNTIES OR MUNICIPALITIES.

§ 23-4-1. Application.

Streets, alleys and other highways, or portions thereof, may be closed and vacated upon the application of the municipality in which they are situated and, where not situated in a municipality, upon the application of the county in which they are situated in the manner provided for in this article. (Acts 1931, No. 49, p. 62; Code 1940, T. 56, § 26.)

§ 23-4-2. Procedure.

(a) The governing body of the municipality where the street, alley or highway, or portion thereof, to be closed and vacated is situated in a municipality and, in other cases, the county commission of the county in which the street, alley, highway, or portion thereof, is situated shall, after causing to be published in a newspaper once a week for three consecutive weeks in the county a notice which shall describe the street, alley, highway or portion thereof proposed to be closed and vacated and also give the date of the hearing, first adopt a resolution to the effect that it is in the public interest that such street, alley, highway or portion thereof be closed and vacated; and thereafter, such governing body may file in the office of the judge of probate in the county in which such street, alley or highway, or portion thereof, is located, its petition requesting the closing and vacating of such street, alley or highway, or such portion thereof.

(b) The petition shall describe with accuracy the street, alley or highway, or portion thereof, to be closed and vacated and shall give the names of the owner or owners of the abutting lots or parcels of land and also the owner or owners of such

other lots or parcels of land, if any, which will be cut off from access thereby over some other reasonable and convenient way. The petition shall further set forth that it is in the interest of the public that such street, alley or highway, or portion thereof, be closed and vacated, and that a resolution to that effect has been adopted by the governing body of the municipality or county, as hereinbefore set forth.

(c) Thereupon, the probate court shall set the petition for hearing and shall issue notice of the pendency of the petition to the persons named in the petition. Such notice shall be served upon the said abutting owner or owners and also the person or persons, if any, named in the petition whose access will be affected, resident in this state as civil process is now served, not less than 10 days prior to the hearing of the petition. In case of a nonresident owner or owners or parties in interest or unknown defendants, the probate court shall cause to be published in a newspaper published in the county said notice, which shall contain the nature of the petition and in which shall be described the street, alley or highway, or portion thereof, proposed to be closed and vacated, and all such persons shall be required to appear upon the hearing thereof and to either assent to the granting of the petition or contest the same as they may see fit. Such notice shall be published once a week for three consecutive weeks prior to the date set for the hearing of the petition and shall give the date on which the hearing is to be had. (Acts 1931, No. 49, p. 62; Code 1940, T. 56, § 27.)

§ 23-4-3. Contest by interested persons.

Upon the hearing of the petition, any person or persons owning lands, or any interest therein, which abut on such street, alley or highway, or any portion thereof, and also the owner or owners of such other lots or parcels of land which will, by the proposed closing and vacating, be cut off from access thereby over some other reasonable and convenient way, may appear and assent in writing to the granting of the petition, or contest the same or suffer the same to be taken in de-

fault against him or them; but the resolution of the municipality or county that it is to the public interest that such street, alley or highway, or portion thereof, be closed and vacated shall be prima facie to that effect. If upon the hearing the court shall deny the petition, it shall so order and dismiss the petition. If, on the other hand, the court upon the hearing shall grant the petition, it shall so order, and thereupon, it shall appoint three commissioners, who shall be residents of the county or municipality in which the property is located and freeholders, to assess the damages of the owner or owners of the abutting lands which will result from the closing and vacating of the street, alley or highway, or portion thereof, and also the owner or owners, if any, of such other lots or parcels of land which will be cut off from access thereby over some other reasonable and convenient way who fail to assent to the granting of the petition. Such commissioners shall be duly sworn by the probate judge faithfully to discharge their duties and shall view the lands and hear any evidence which the parties may offer bearing on the damages which will result by such closing or vacating. The commissioners shall submit their report in writing within 10 days after qualification, which report shall assess the damages of the respective nonassenting landowners and shall describe the several tracts as to which such damages are assessed. The commissioners shall each receive $3.00 per day for their services, to be taxed as part of the cost of the proceeding. (Acts 1931, No. 49, p. 62; Code 1940, T. 56, § 28.)

§ 23-4-4. Recordation of report by commissioners; payment of costs and damages.

Upon the coming in of the report of the commissioners, the probate court shall cause the same to be recorded among its records and the petitioner may, within 30 days after the making of such report, pay, or cause to be paid, the cost of the proceeding and the damages assessed by the commissioners; and upon such payment, the street, alley or highway, or portion thereof, ordered to be closed and vacated shall be closed and vacated

and all interest of the public therein shall cease and determine. (Acts 1931, No. 49, p. 62; Code 1940, T. 56, § 29.)

§ 23-4-5. Appeals.

Either the petitioner or any contesting landowner may appeal within 30 days from the order of the probate court closing and vacating the street to the circuit court of the county in which the lands are situated, and upon such appeal, the proceeding shall be tried de novo, either party having the right to demand trial by jury when and as such demand is authorized in civil actions in such court. In case the appeal is taken by any landowner, the appeal shall not suspend the effect of the proceeding in the probate court if the petitioner shall pay into the probate court the damages assessed to such landowner, together with the cost of the proceeding, and shall give bond in double the amount of such assessment, with sureties, to be approved by the probate judge, conditioned upon paying such damages as may be assessed to such landowner upon appeal. From the judgment of the circuit court, an appeal may be taken within 42 days by either party to the court of civil appeals or the supreme court in accordance with the Alabama Rules of Appellate Procedure. (Acts 1931, No. 49, p. 62; Code 1940, T. 56, § 30.)

§ 23-4-6. Article deemed cumulative.

The provisions of this article shall not be held to repeal any existing statute relating to the closing, changing or vacating of streets and highways, but shall be cumulative. (Acts 1931, No. 49, p. 62; Code 1940, T. 56, § 31.)

ARTICLE 2.

ABUTTING LANDOWNERS.

§ 23-4-20. Vacation of street or alley.

(a) Any street or alley may be vacated, in whole or in part, by the owner or owners of the land abutting the street or alley

or abutting that portion of the street or alley desired to be vacated joining in a written instrument declaring the same to be vacated, such written instrument to be executed, acknowledged and recorded in like manner as conveyances of land, which declaration being duly recorded shall operate to destroy the force and effect of the dedication of said street or alley or portion vacated and to divest all public rights, including any rights which may have been acquired by prescription, in that part of the street or alley so vacated; provided, that if any such street or alley is within the limits of any municipality, the assent to such vacation of the city council or other governing body of the municipality must be procured, evidenced by a resolution adopted by such governing body, a copy of which, certified by the clerk or ministerial officer in charge of the records of the municipality must be attached to, filed and recorded with the written declaration of vacation; and if any such street or alley has been or is being used as a public road and is not within the limits of any municipality, the assent to such vacation of the county commission of the county in which such street or alley is situated must be procured, evidenced by resolution adopted by such board or court, a copy of which, certified by the head thereof, must be attached to, filed and recorded with the declaration of vacation. Such vacation shall not deprive other property owners of such right as they may have to convenient and reasonable means of ingress and egress to and from their property, and if such right is not afforded by the remaining streets and alleys, another street or alley affording such right must be dedicated.

(b) The provisions of this section shall not be held to repeal any existing statute relating to the vacation of streets or alleys or parts thereof. (Acts 1939, No. 69, p. 110; Code 1940, T. 56, § 32.)